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No. 83-1358

In The
Supreme Court of the United States
October Term, 1983

M. P. DORAN, JAMES A. SCOTT
and JAMES H. BAILEY,

Petitioners,

vs.

F. H. HOULE and JAMES W. GLOSSER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Under circumstances in which a contract between federal and state agencies authorizes a federally owned and furnished card method of testing for Brucellosis to be exercised only by Deputy State Veterinarians who have been issued annual permits by the State Veterinarian, does a Deputy State Veterinarian, whose private veterinary practice has been enhanced through veterinary work acquired ancillary to his use of the card test, have a constitutionally protected property right to the continued use thereof when (a) the veterinarian holds his deputyship at the will of the State Veterinarian, (b) the Deputy State Veterinarian has allowed his card test permit to expire, and (c) the State Veterinarian, in disciplining the deputy, withdraws his day-to-day, at sufferance authority to use the card test?

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STATEMENT OF THE CASE

The card method of testing for Brucellosis is owned by the United States with the intended beneficiary being cattlemen and the cattle industry, not veterinarians holding card test authority. Accordingly, the card method of testing and card test kits, at the time here involved, could be used by veterinarians only under certain conditions. Two of those conditions were that (1) the veterinarian must have held an appointment from Montana State Vet-

erinarian Glosser as a deputy, and (2) the deputy could administer the card test only if an annual permit had been issued to him by the State Veterinarian. Because the cattle industry was the intended benficiary of the card method of testing, the United States prohibited permit holders from charging for the test itself, although they could charge for drawing the blood sample necessary for performing the test.

The Petitioners were Deputy State Veterinarians who, under Montana law, held their appointments as deputies at the will of the Montana State Veterinarian. The Petitioners had at one time been issued permits by the State Veterinarian, but the permits expired by their terms almost eight months before the occurrence which is the basis of the Petitioners' action. Although the office of the State Veterinarian continued to furnish card test kits to the Petitioners after the expiration of their permits, and the Petitioners continued to use the card tests at the sufferance of the State Veterinarian, the Petitioners did nothing to renew their annual permits.

Two cows suspected of Brucellosis were allowed into interstate commerce in violation of federal law. State Veterinarian Glosser was of the opinion that those violations were allowed to occur as a consequence of improper usage and control of the Brucellosis card tests by the Petitioners. Under state law, State Veterinarian Glosser could have suspended or revoked the appointment of the Petitioners as Deputy State Veterinarians without any cause whatsoever which by itself would have constituted termination of Petitioners' card test authority; however, in State Veterinarian Glosser's consideration, that dis-

ciplinary measure would have been too severe for large animal practitioners. Accordingly, State Veterinarian Glosser disciplined his deputies by sequestering the card test kits in the possession of those deputies and by withdrawing such authority as they had to use the kits.

Even though their card test authority was withdrawn, Petitioners continued to perform all other veterinary services which veterinarians not holding card test authority could perform; they incurred no direct loss of income. Petitioners, for a period of time, continued to draw blood samples for tests and charged for such drawings. The only function in the testing program Petitioners could not perform was the card test itself for which a charge could *not* be made even if they had retained card test authority. The Petitioners brought this action under 42 USC § 1983 which, necessarily, requires a constitutionally protected property right to give rise to a cause of action. The Petitioners' claim was founded upon loss of the enhancements to their private practice acquired through veterinary work which they acknowledge as having been acquired ancillary to their use of the government-owned card test kits.

ARGUMENT

A. The Petitioners Had No Property Right In Continued Usage Of The Card Test Kits.

I.

Upon expiration of their one year permits, the Petitioners at most had but day-to-day card test authority.

Therefore, to the extent Petitioners retained any authority beyond the expiration date of their permits, that authority was held at the sufferance, at the will, or at the pleasure of the officials charged with administering the permit program in Montana. See *Otten v. San Francisco Hotel Owners Assoc.*, 74 Cal.App.2d 341, 168 P.2d 739 (1946) (nonrenewal of expired service contract).

Under the facts of this case, the card test kits could be used only by veterinarians holding appointment as deputies from State Veterinarian Glosser. Under Montana law, deputies hold their appointments as deputies only at the will of the State Veterinarian and can have their deputyship revoked or suspended at any time without cause and without notice or opportunity for hearing. §§ 2-16-301 and 2-16-213(1) MCA. See also *Rusch v. Board of County Commissioners*, 121 Mont. 162, 191 P.2d 670 (1948); *Meinecke v. McFarland*, 122 Mont. 515, 206 P.2d 1012 (1949); *Bonner v. District Court*, 122 Mont. 464, 206 P.2d 166 (1949); and *State ex rel. MacGilvra v. Historical Society*, 148 Mont. 182, 418 P.2d 874 (1966). A superior officer may surely impose a less severe sanction. See *Garrett v. Mathews*, 625 F.2d 658 (5th Cir. 1980).

Under decisions of this Court too well known to require citation of authority, there is no constitutionally protected property interest in an "at will" or an "at pleasure" authorization.

II.

There is nothing under Montana law, including the Montana Administrative Procedure Act, Section 2-4-101

MCA, et seq. (hereinafter "MAPA"), which itself affords the Petitioners the right to a hearing prior to termination of their day-to-day card test authority. It is only if and when some law other than the MAPA requires a hearing that the MAPA provides the framework and guidelines for the hearing required by that other law. *Nye v. Department of Livestock*, — Mont. —, 639 P.2d 498, 501 (1982).

B. The "Clearly Erroneous" Requirement of Rule 52, F. R. Civ. P., Is Not Applicable To Legal Issues Requiring An Interpretation Of The Federal Constitution.

The District Court "findings" were made upon the Respondent's Motion for Summary Judgment which required the District Court merely to resolve whether the law, as applied to established facts, was violated. Such resolutions, as well as conclusions on mixed questions of law and fact, are independently reviewable by an appellate court. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); and *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981).

C. Decisions Of The Courts Of Appeals Are Not In Conflict.

The cases cited by Petitioners, i.e., *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), and *W. G. Cosby Transfer and Storage Corporation v. Froehlke*, 480 F.2d 498 (4th Cir. 1973), are not in conflict with the decision herein of the Ninth Circuit Court of Appeals. The holding in each of those cases was that the government agency there involved could not terminate a *business relationship* existing between the agency and the plaintiff without af-

fording a due process type of hearing; additionally, the intended beneficiary of the "permit" in those cases was the permittee. In the present case, no *business relationship* existed between the Petitioners and State Veterinarian Glosser; on the contrary, the relationship was merely one in which the Petitioners were at-will deputies of the State Veterinarian who, in disciplinary action, withdrew the Petitioners' day-to-day authority as deputies to use government-owned property, the intended beneficiary of which was the livestock industry and not the Petitioners or the veterinary profession.

Nor is the case of *Standard Airlines Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. 1949), in conflict with the decision herein of the Court of Appeals. *Standard Airlines* revolved around the perceived total destruction of investment and business property, in a business wholly dependent upon a government permit. (*Standard Airlines, supra*, p. 20). These factors are wholly absent in the instant fact situation in that here all that was lost by Petitioners as a result of the withdrawal of their day-to-day authority to perform the card tests was their authority to perform a test for which they could not charge a fee.

D. The Subject Question Is Not Worthy Of Certiorari In That It Is Too Unique, Has Little Effect, And A Reversal Would Not Bring About A Different Result.

As Petitioners acknowledge on page 8 of their Petition, they "were unique in that all other permit holders in the [Brucellosis] eradication program were employed by

the state and worked exclusively at auction markets." This, undoubtedly, is one of the reasons why the Petitioners have found "no cases which are four-square with the instant case" (Petition, p. 14).

Additionally, for all practical purposes, the question is moot in that because of a change in Department of Livestock policy, the card test authority of the Petitioners would have terminated anyway seven months later. Furthermore, Montana soon thereafter became a "Brucellosis free state", and the testing requirements which necessitated the original implementation of the card method of testing were lowered, thereby resulting in the dropping of the card method of testing.

Even if certiorari were granted and the decision of the Circuit Court were reversed because of a determination that the Petitioners did have a property interest, entry of judgment in favor of Respondent Glosser would still result. The reason for this is that the Petitioners were afforded a hearing shortly after their authority was withdrawn, thus complying with due process requirements. *Parratt v. Taylor*, 451 U.S. 527, 539-541 (1981); and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982).

Finally, as Petitioners have acknowledge, they occupied a unique position and there are no cases "four-square with the instant case." Inasmuch as there was no "clearly established law" which Respondent Glosser could be said to have violated, and since he had qualified immunity as a state official, the case would be dismissed under authority of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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